Nos. 85-1329 and 85-6207

In the Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, GEORGE CARISTE,
SOL N. KLAYMING AND NATHAN HELFAND, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
VUITTON ET FILS S.A. AND LOUIS VUITTON S.A.

BARRY DEAN KLAYMING, PETITIONER

v.

UNITED STATES OF AMERICA EX REL.
VUITTON ET FILS S.A. AND LOUIS VUITTON S.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether this Court, in the exercise of its supervisory authority over the conduct of contempt proceedings in federal district courts, should adopt a rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt based on the alleged violation of an injunction entered in a civil case.

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INTEREST OF THE UNITED STATES

The appointment of private counsel to prosecute charges of criminal contempt in federal court implicates important interests of the United States, because federal criminal prosecutions ordinarily are conducted under the supervision of the Attorney General. 28 U.S.C. 515, 519, 547(1). The United States believes that departures from this practice must be carefully circumscribed and should be permitted only on the basis of substantial justification and only in conformity with principles of fairness, sound

judicial administration, and the disinterested exercise of federal prosecutorial responsibility.[1]

STATEMENT

1. The relators in these prosecutions for criminal contempt—Vuitton et Fils S.A. and Louis Vuitton S.A. ("Vuitton")—sell luggage, handbags, and accessories under Vuitton's registered trademark. *Vuitton et Fils S.A.* v. *J. Young Enterprises, Inc.*, 644 F.2d 769, 772 (9th Cir. 1981); C.A. App. 438A, 455A.[2] On December 6, 1978, Vuitton filed an action in the United States District Court for the Southern District of New York, seeking damages and injunctive relief for alleged acts of trademark infringement and unfair competition in violation of 15 U.S.C. 1114 and 1125 and state law (C.A. App. 426A-432A).[3] On December 12, 1978, with the consent of the defendants, the court entered a preliminary injunction barring petitioner Sol Klayminc and two family-owned businesses from infringing Vuitton's trademark. Klayminc's wife, his son (petitioner Barry Klayminc),

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[1] The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper opposing party in any prosecution for criminal contempt. See note 15, *infra*. This case therefore would appear to fall within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a particular case directs otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." However, in order to assure that the Court may have the benefit of the arguments in support of the appointment of interested private counsel in a case such as this, the Solicitor General has authorized the counsel who were appointed by the district court to appear on behalf of the respondent in this Court as well. Accordingly, the Solicitor General files this brief on behalf of the United States as amicus curiae to express the distinct views of the Executive Branch.

[2] "C.A. App." refers to the joint appendix and the supplemental appendix of appellee filed in the court of appeals. "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-1329.

[3] As of 1984, Vuitton had brought more than 80 such actions to protect its trademark and profits. Pet. App. 116A; *In re Vuitton et Fils S.A.*, 606 F.2d 1, 2 (2d Cir. 1979).

and another family-owned business subsequently were joined as defendants. Pet. App. 5A, 116A-117A.

On July 8, 1981, the district court, upon Vuitton's application, issued an order directing Sol Klayminc and others to show cause why they should not be held in criminal contempt for violating the preliminary injunction. The court appointed Vuitton's counsel, J. Joseph Bainton, to prosecute the criminal contempt on behalf of the United States. Pet. App. 117A-118A; C.A. App. 473A-476A. The charges were referred to a magistrate, who convicted Sol Klayminc and two family-owned businesses of contempt. Thereafter, on July 30, 1982, a consent judgment was entered in the underlying civil action. The consent judgment required the Klaymincs and persons acting in concert with them to refrain from manufacturing, distributing, or simulating goods in violation of Vuitton's trademarks. Sol and Barry Klayminc and other defendants also agreed to pay Vuitton $100,000. Pet. App. 6A, 118A-119A, 193A-204A. When the magistrate was informed of this settlement, he suspended Sol Klayminc's sentence on the criminal contempt conviction and placed him on one year's probation. C.A. App. 595A; Pet. App. 10A n.1, 118A-119A.

2. In early 1983, a private investigating firm in Florida proposed to Vuitton and other owners of fashion trademarks that they share the expenses of a "sting" operation to identify persons who were infringing their trademarks. Under the arrangement, employees of the Florida firm posed as persons interested in buying and selling counterfeit merchandise on a large scale. Pet. App. 6A-7A, 119A-120A. The principal investigator was Melvin Weinberg, who had participated in the "Abscam" investigation (*id.* at 120A).

Early in the investigation, Weinberg met with petitioners Helfand and Sol Klayminc and discussed the prospects for selling counterfeit Vuitton wares and locating investors to finance a factory Klayminc was operating in Haiti. Klayminc stated that his son, Barry, had a 25% interest in the Haitian operation and that counterfeit Vuitton merchandise could be obtained from a man

in New Jersey named "George," a reference to petitioner Cariste. Pet. App. 8A-9A, 121A; C.A. App. 612A-615A, 644A-645A, 656A-657A, 1898A-1900A.

3. Three days later Bainton, the attorney for Vuitton, informed the district court of these events (J.A. 18-26; C.A. App. 606A-618A). Bainton and his law partner, Robert P. Devlin, sought to be appointed "to continue the investigation and, in due course, the prosecution of what appears to be a massive international conspiracy to violate this Court's permanent injunction" (J.A. 25; C.A. App. 615A-616A; Pet. App. 9A, 121A-122A). In addition, Bainton advised the court that Weinberg planned to videotape a meeting on April 5, 1983, with petitioners Sol and Barry Klayminc, to which Sol Klayminc had been instructed to bring 25 of his better counterfeit Vuitton purses. Pet. App. 11A, 122A-123A; J.A. 25-26; C.A. App. 616A-617A.[4] In an order issued under seal on March 31, 1983, the district court appointed Bainton and Devlin "to represent the United States of America in connection with the further investigation" and "the ultimate prosecution" of the apparent contempt (J.A. 27; C.A. App. 605A). The court also approved the investigation Bainton outlined in his affidavit (*ibid.*). Pet. App. 10A, 11A, 123A-124A; C.A. App. 604A-605A.

At the conclusion of a brief ex parte hearing on April 6, 1983, Judge Brieant asked Bainton to inform the United States Attorney's office about the investigation (J.A. 62-63; C.A. App. 661A-662A).[5] Bainton did so by a letter written that same day to the Chief of the Criminal Division of that office. Bainton enclosed the order

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[4] Bainton's application noted that although a government prosecutor is not so limited, it is considered unethical for an attorney in a civil case to participate in the surreptitious recording of a conversation. See C.A. App. 617A, citing ABA Formal Op. 337 (1974).

[5] Judge Brieant had been absent on March 31, when Bainton filed his motion for appointment. Judge Lasker granted the motion but ordered Bainton and Devlin to notify Judge Brieant of the order at the earliest opportunity. Pet. App. 10A, 12A, 124A n.1; C.A. App. 659A.

appointing him to prosecute the contempt and his supporting affidavit (J.A. 64; C.A. App. 664A). The United States Attorney's Office took no action in response to Bainton's letter.[6] The United States Attorney's Office was again contacted on the eve of trial, but it did not enter the case. Pet. App. 12A-13A, 125A; C.A. App. 1801A, 2041A-2043A.

4. Bainton's investigation continued into May 1983. In the course of the investigation, more than 100 audio and video tapes were made of telephone calls and meetings with petitioners and others. The recorded conversations established that each of the petitioners was aware that Sol Klayminc's counterfeiting activities were unlawful (see C.A. App. 611A-612A, 1097A, 1145A-1147A, 1556A-1558A, 1560A-1564A, 1635A-1636A, 1647A-1651A).

On April 5, Klayminc met with Weinberg, as planned. He brought with him 25 counterfeit Vuitton bags, which he said had been made by petitioner Cariste. Weinberg paid Klayminc $625 for the bags. C.A. App. 704A, 709A, 2062A. In addition, Weinberg pretended to be interested in buying 50 percent of Klayminc's operation in Haiti (*id.* at 709A, 736A, 741A-742A, 767A-768A, 864A-870A, 1545A-1546A). Klayminc told Weinberg that an injunction prevented him from making such goods, and when he stated that he could not take the chance of actually handling counterfeit bags in the United States, Weinberg suggested that Klayminc ship them to other countries (*id.* at 717A, 903A-906A, 908A).

On several occasions, Sol Klayminc told Weinberg that petitioner Young could provide fabric for the Haitian operation (C.A. App. A287). Weinberg then met with Young, who agreed to supply 5000 yards of fabric, which he could ship "any place you want" (*id.* at 1077A,

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[6] Bainton also had occasion to consult with the District Attorney's Office in Los Angeles. To ensure that electronic recordings would not violate California law, it was agreed that any investigation conducted in Los Angeles would be under the direction of the District Attorney. Pet. App. 12A n.2, 45A; J.A. 88-89; C.A. App. 665A-666A.

1586A). Barry Klayminc subsequently told Weinberg that Cariste had begun cutting bags and had sent them to Sol Klayminc in Haiti for assembly (*id.* at A367-A368; see also *id.* at 1709A, 2027A, 2371A). At a meeting with Barry Klayminc and Cariste, Weinberg said he would need 1500 handbags by May 2, and Cariste agreed to deliver them (*id.* at 2025A-2026A).

5. On April 26, Bainton applied for an order under Fed. R. Crim. P. 42(b) requiring petitioners and others to show cause why they should not be held in criminal contempt for violating the 1982 injunction (Pet. App. 14A; J.A. 99-102; C.A. App. 667A-673A). The district court issued the show cause order the same day (C.A. App. 673A).[7]

Petitioners challenged the order to show cause, the appointment of Bainton and Devlin as prosecutors, and the conduct of the investigation (Pet. App. 14A), but the district court rejected those challenges (*id.* at 114A-192A).[8] In the trial before Judge Brieant and a jury, Bainton introduced 28 of the recorded conversations; in addition, Weinberg and David Rochman, who was charged

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[7] In July 1983, prior to petitioners' trial, Sol Klayminc and his wife filed a petition in bankruptcy (C.A. App. 681A). Vuitton filed objections to the discharge in bankruptcy of the $80,000 the Klaymincs still owed under the 1982 settlement of the civil action (*id.* at 682A-683A). Vuitton contended that the Klaymincs' principal source of income was from their manufacture of counterfeit Vuitton merchandise and that they never intended to pay the $100,000, concealed their assets, and made false assertions to the bankruptcy court (*id.* at 685A-692A). See J.A. 108-117. At a December 1983 hearing in the bankruptcy proceedings, five tape recordings made by Weinberg were admitted into evidence in support of Vuitton's objections (C.A. App. A56-A84). In an order dated January 13, 1984, the bankruptcy court granted Vuitton's motion in part and denied it in part (*id.* at 694A-700A).

[8] To prevent any prejudice to petitioners that could have resulted from the conflict between Bainton's privileged relation with Vuitton and the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500, the district court ruled that by authorizing Bainton to pursue the criminal contempt, Vuitton had waived any privilege it might have regarding such information. Pet. App. 161A-162A.

in the show cause order, testified for the prosecution at trial.[9] At the conclusion of the trial, Sol Klayminc was convicted of criminal contempt, in violation of 18 U.S.C. 401(3), and the other petitioners were convicted of aiding and abetting that contempt, in violation of 18 U.S.C. 401(3) and 2. Petitioners were sentenced to the following terms of imprisonment: Sol Klayminc, 5 years; Young, 2½ years; Barry Klayminc, 9 months; Cariste, 9 months; and Helfand, 6 months.

6. A divided panel of the court of appeals affirmed the convictions (Pet. App. 1A-48A). On the authority of prior Second Circuit precedent, the court rejected petitioners' claim that the appointment of Bainton to prosecute the contempt charges under Fed. R. Crim. P. 42(b) violated their due process right to a disinterested prosecutor. Pet. App. 17A-22A, citing *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), and *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936). The court concluded that a defendant's right to a distinterested prosecutor "is not absolute," because a prosecutor's preconceived belief in a defendant's guilt is not a ground for disqualification, as it would be for a judge or juror (Pet. App. 18A-20A). Moreover the court noted that attorneys appointed pursuant to Rule 42(b) are subject to judicial control, particularly because the judge decides whether to prosecute (Pet. App. 20A-21A). Finally, the court noted that coun-

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[9] Pursuant to an agreement with Bainton, Rochman pleaded guilty to a petty violation of 18 U.S.C. 401, in return for his testimony for the prosecution. Concurrently with the plea agreement, Bainton, as counsel for Vuitton and others, represented to Rochman's attorney that if Rochman performed as provided in the plea agreement, a civil suit filed by Vuitton against Rochman and others would be dismissed with prejudice. J.A. 103-107; C.A. App. A85-A89, 2345A-2348A.

Following the trial of the other defendants, Robert G. Pariseault, who also was charged in the show cause order, pleaded guilty to a misdemeanor violation of 18 U.S.C. 401. See 9/11/84 Tr. 3-4. Vuitton also simultaneously settled its civil litigation against Pariseault.

sel for the plaintiff in the underlying civil action are most familiar with the case and therefore can prosecute the criminal contempt most efficiently (*id.* at 17A-18A).

The court of appeals likewise rejected petitioners' argument that Rule 42(b) does not permit the specially appointed private counsel to conduct a wide-ranging investigation. The court held that the power to prosecute encompasses the power to investigate and to gather evidence by means of a "sting" operation (Pet. App. 24A). Because Bainton's investigation was undertaken with the approval of the district court, the court of appeals held, it was not unethical (*id.* at 24A-25A).

Judge Oakes dissented (Pet. App. 34A-48A). He did not question the authority of the district court to appoint counsel for an interested private party to prosecute the contempt charges (*id.* at 36A). But Judge Oakes concluded that the convictions should be reversed because, in his view, there was an insufficient showing of need for Bainton's investigatory techniques and inadequate provision for supervising them (*id.* at 37A-48A). Judge Oakes took the position that, in light of the possibility that animosities in the related civil litigation could improperly influence the investigation, a court should permit a private attorney appointed under Rule 42(b) to conduct a "sting" operation in these circumstances only on the basis of "a strong showing that a court order has been violated and where there is no other way of catching the contemners" (Pet. App. 36A). In this case, although counsel's application for appointment indicated that petitioners already had violated the injunction, Judge Oakes concluded that petitioners "had probably not violated the earlier order at that time and * * * the investigation may have been the proximate cause of the violation" (*id.* at 47A-48A).

SUMMARY OF ARGUMENT

A. The Executive Branch, like the Judicial Branch, has legitimate interests in the prosecution of criminal contempts, because those prosecutions protect the general public order as well as the courts' need to enforce judicial

authority. The interests of both Branches will be vindicated if the United States Attorney brings a prosecution. That course would render it unnecessary for the court to assert the contempt power, which is always to be exercised with self-restraint.

Accordingly, before a district court appoints a private attorney to prosecute a criminal contempt under Rule 42(b), it should first refer the matter to the United States Attorney. If the United States Attorney concludes after any necessary grand jury or other investigation that prosecution is warranted, he may file an indictment or information or apply for an order to show cause under Rule 42(b). Even if the United States Attorney concludes that contempt charges should not be brought, referring the case to the United States Attorney for his consideration is still a useful measure, since the United States Attorney's detached review might prevent an imprudent exercise of the contempt power by the court. Referral is especially appropriate where the violation of an injunction also violates a federal criminal statute. The United States Attorney can then evaluate the evidence in light of prosecutorial standards under the substantive statute, taking into account the need to vindicate the court's authority.

If the United States Attorney declines to prosecute the contempt, the court is not barred from appointing a private attorney to do so. The Appointments Clause of the Constitution expressly permits Congress to vest appointing authority in the courts. Similarly, although separation of powers principles require that ordinary criminal cases be prosecuted exclusively by Executive Branch officials, those principles do not bar a court from appointing a private attorney where the court itself initiates the proceedings in the exercise of its special power to punish contempts.

B. If the United States Attorney chooses not to prosecute the contempt in a case such as this one, the court should not appoint the attorney who represents an interested private party in the underlying civil litigation to do so. If a Justice Department attorney who represented

that private party also brought a related criminal prosecution on behalf of the United States, he would violate the criminal conflict-of-interest laws, departmental regulations, and ethical standards. This Court should exercise its supervisory authority to require that a district court adhere to similar standards of disinterested prosecution if it appoints a private attorney to prosecute the contempt charges. The Court may adopt such a supervisory rule, because it relates to the internal operations of the Judicial Branch and the courts' recognized authority to regulate the conduct of attorneys as officers of the court.

A rule barring the appointment of counsel for an interested private party to prosecute a serious criminal contempt under Rule 42(b) would constitute a sound exercise of supervisory power. It would conform such appointments to the federal tradition of public prosecutions; it would respect conflict-of-interest standards enacted by Congress; and it would avoid the risk that private financial interests could taint the decisionmaking process in serious criminal cases. Employing the supervisory power is also appropriate because it would avoid the need to resolve more sweeping claims under the Due Process Clause, and it would preserve the flexibility that is needed to address the complex questions involved in the wide variety of contempt cases that arise from violations of court orders in civil litigation.

ARGUMENT

AN ATTORNEY WHO REPRESENTS AN INTERESTED PRIVATE PARTY IN CIVIL LITIGATION SHOULD NOT BE APPOINTED TO PROSECUTE CHARGES OF CRIMINAL CONTEMPT ARISING OUT OF THAT LITIGATION

Petitioners contend that the appointment of Vuitton's attorneys to prosecute the charges of criminal contempt violated due process by depriving them of their asserted right to a disinterested prosecutor. In our view, there is no need for the Court to decide that constitutional question, because the Court may properly find the appointment to have been improper in the exercise of this

Court's special supervisory authority over the punishment of contempts in the federal courts.

The Sixth Circuit recently held, in the exercise of its supervisory power, that a district court may not appoint the attorney for an interested private litigant to prosecute related charges of criminal contempt. *Polo Fashions, Inc.* v. *Stock Buyers International, Inc.*, 760 F.2d 698 (1985), petition for cert. pending, No. 85-455.[10] In response to this Court's invitation, the Solicitor General filed an amicus curiae brief on behalf of the United States in *Polo Fashions*, in which we argued (U.S. Br. 7-15) that the Sixth Circuit did not exceed its supervisory authority by establishing a general rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt in that circuit. We now urge this Court to take a similar approach by exercising its supervisory power to bar such appointments in the federal courts generally.

Before considering whether the Court should exercise its supervisory power in this manner, the Court must address the threshold question whether a district court may *ever* appoint a private attorney to prosecute contempts under Rule 42(b). We submit that private counsel should not be appointed under Rule 42(b) to prosecute charges of criminal contempt unless the allegations have first been referred to the United States Attorney and he has declined prosecution.

A. Before Appointing A Private Attorney To Prosecute A Criminal Contempt, The Court Should First Formally Refer The Matter To The United States Attorney

1. Contempt proceedings differ from ordinary criminal cases, because they serve not only the general interests of public order, but also the particular interest of the courts in vindicating judicial authority. For that reason, both the Executive Branch and the Judicial Branch have

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[10] The Sixth Circuit expressly declined to hold that such an appointment "constitutes a per se due process violation" (760 F.2d at 704).

legitimate interests in the prosecution of criminal contempts in appropriate circumstances. The need to accommodate the interests of both Branches is especially strong where, as here, the alleged contempt is based on the violation of an injunction designed to regulate the conduct of private parties out of the presence of the court. In that setting, the interest of the court in ensuring the integrity of judicial proceedings is presented with less immediacy than in the case of contempts that are committed in the presence of the court and are properly punished by summary procedures. *United States* v. *Wilson*, 421 U.S. 309, 315-319 (1975); *Taylor* v. *Hayes*, 418 U.S. 488, 497-500 (1974). By the same token, the violation of such an injunction may closely resemble an ordinary criminal offense that is based directly on the violation of a federal statute. Compare *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968); *Green* v. *United States*, 356 U.S. 165, 218-219 (1958) (Black, J., dissenting). Such offenses are deemed to injure the public generally and are properly within the domain of the public prosecutor, the Attorney General.

These considerations suggest that private counsel should not be appointed to prosecute criminal contempts unless it is clear that important interests of the Judicial Branch will not be adequately protected by the Executive Branch's performance of its constitutionally assigned functions. Such deference by the courts to the usual procedures for enforcing the criminal law when possible not only accords respect to the United States Attorney, as the representative of a coordinate Branch with the responsibility for invoking the judicial power; it also comports with this Court's self-imposed limitation on the unilateral assertion of the judicial power in contempt proceedings, which requires that "a court must exercise '[t]he least possible power adequate to the end proposed.'" *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966), quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). See also *United States* v. *Wilson*, 421 U.S. at 319.

Accordingly, we urge the Court to provide that allegations of criminal contempt that occur outside of the pres-

ence of the court should first be formally referred by the court to the United States Attorney. Only if the United States Attorney declines to proceed should the court consider whether to appoint a private attorney to assist the court in the adjudication of the charges. This is the approach suggested by the Sixth Circuit in *Polo Fashions*. See 760 F.2d at 705 ("If the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so."). See also *United States* v. *McKenzie*, 735 F.2d 907, 909-910 (5th Cir. 1984); *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 411 F.2d 312, 319-320 (5th Cir. 1969); S. Rapalje, *A Treatise on Contempt* § 127, at 175 (1884), citing *Durant* v. *Washington County*, 8 F. Cas. 128, 129 (C.C. D. Iowa 1869) (No. 4,191) (Miller, Circuit Justice).

If the district court makes such a referral, the United States Attorney may conduct any additional investigation that may be necessary, either by presenting the matter to the grand jury or by using other investigative resources available to the government.[11] If the United

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[11] Such an investigation would be conducted under governmental supervision and established Justice Department guidelines. For example, the Attorney General has approved detailed substantive and procedural guidelines for the conduct of undercover investigations. See C.A. App. A399-A418; *FBI Undercover Activities, Authorization, and H.R. 3232: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 264-274 (1983). Reliance on that investigative authority would eliminate the concerns raised in this case about the propriety and scope of an investigation conducted by private counsel appointed pursuant to Rule 42(b). These concerns are heightened where the attorney appointed pursuant to Rule 42(b) represents a party who has an interest in the matter, because of the possibility that the contempt might actually be prompted by undercover techniques that were pursued in part to advance the interests of the lawyer's private client (see notes 7, 9, *supra*) or resulted from animosities that developed in the civil litigation. See Pet. Br. 27-29, 33-34, 40-41; Pet. App. 34A-48A (Oakes, J., dissenting); cf. ABA Code of Professional Responsibility, DR 1-102(A)(4) (1979); ABA Formal Ops. 336, 337 (1974). Although we would hesitate to say that a court is without power to

States Attorney concludes that prosecution is warranted, judicial proceedings can be commenced by the filing of an information or indictment in accordance with the procedures governing federal criminal prosecutions generally. Fed. R. Crim. P. 7(a). See, *e.g.*, *United States* v. *Armstrong*, 781 F.2d 700, 703-704 (9th Cir. 1986); *United States* v. *Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States* v. *Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); cf. *United States* v. *Shipp*, 203 U.S. 563 (1906) (criminal contempt proceedings initiated in this Court by Attorney General's filing of an information). Alternatively, the United States Attorney can present charges of criminal contempt to the district court by filing an application for an order to show cause, a mode of proceeding that is expressly contemplated by Rule 42(b). See *United States* v. *Barnett*, 376 U.S. 681, 686 (1964); *Frank* v. *United States*, 384 F.2d 276, 278 (10th Cir. 1967), aff'd on other grounds, 395 U.S. 147 (1969).

Referring allegations of criminal contempt to the United States Attorney is appropriate for a number of reasons. The public prosecutor's judgment that contempt charges should not be brought is ordinarily entitled to respect by the court, because it reflects a disinterested assessment of the appropriateness of seeking criminal sanctions for particular conduct, with due regard for the

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authorize a private attorney appointed under Rule 42(b) to employ undercover techniques under any circumstances, such investigations ordinarily should be undertaken by the arm of government with the constitutional and statutory responsibility, as well as the necessary experience, "to detect and prosecute crimes against the United States" (28 U.S.C. 533(1)).

Contrary to petitioners' suggestion (Pet. Br. 40-41), however, a private attorney appointed by a court pursuant to Rule 42(b) would in no event have authority to appear before the grand jury and present evidence to it. That is the sole responsibility of "[a]ttorneys for the government" (Fed. R. Crim. P. 6(d)), a term that is specifically limited to the Attorney General, United States Attorneys, and their authorized assistants (Fed. R. Crim. P. 54(c)). See *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 426, 428 (1983).

importance of preserving the integrity of the court's processes.[12] See *United States* v. *McKenzie*, 735 F.2d at 910; Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Ford. L. Rev. 1141, 1168 & n.121 (1986). This review by the disinterested public prosecutor can serve as an important independent check against the potential for arbitrary exercise of the contempt power that might occasionally result from conduct that "often strikes at the most vulnerable and human qualities of a judge's temperament." *Bloom* v. *Illinois*, 391 U.S. at 202.

The referral process is particularly appropriate when the contemnor's conduct in violation of an injunction also contravenes a federal criminal statute, as would now be true with respect to petitioners' conduct by virtue of a federal statute enacted in 1984 that prohibits trademark infringement. 18 U.S.C. (Supp. II) 2320. The United States Attorney may then evaluate the evidence in light of the general prosecutorial standards that the Department of Justice applies in enforcing federal criminal laws, to determine whether the particular conduct warrants prosecution. Among the factors bearing on that determination, of course, is the fact that the particular conduct also violates a court order. If the United States Attorney decides to prosecute the contemnor for the substantive offense, the interest underlying the contempt power—enforcing compliance with judicial orders—would also be vindicated.

The statutory provisions relating to criminal contempt also suggest that ordinarily such contempts should be prosecuted by the United States Attorney. Congress has

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[12] See *United States Attorney's Manual* § 9-39.318 (1984):

> In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the U.S. Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose.

provided that any person whose actions in violation of a court order also constitute a criminal offense under federal or state law "shall be prosecuted for such contempt as provided in [18 U.S.C. 3691]." 18 U.S.C. 402. Section 3691 in turn provides that the accused "shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases." The usual "practice in other criminal cases" arising under federal law of course is that the prosecution is brought by the United States Attorney, under the supervision of the Attorney General. 28 U.S.C. 515, 519, 549(1). Referring the allegations of contempt to the United States Attorney in the first instance would enable the district court to "conform as near as may be" to that practice.

That legislative judgment is relevant to this case because the right to a jury trial, although not statutorily guaranteed by 18 U.S.C. 402 and 3691, was constitutionally protected for the four petitioners who received sentences in excess of 6 months. See *Bloom* v. *Illinois*, *supra*; *Baldwin* v. *New York*, 399 U.S. 66 (1970); *Taylor* v. *Hayes*, 418 U.S. at 495-496. The decision in *Bloom* extending the jury trial right to criminal contempts rested in large part on the Court's conclusions that "[c]riminal contempt is a crime in the ordinary sense" (391 U.S. at 201) and that "[i]n modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases" (*id.* at 207; see *id.* at 202-206). Because Congress regarded a jury trial as the hallmark of a criminal prosecution when it enacted 18 U.S.C. 402 and 3691 (see *Bloom*, 391 U.S. at 204 n.6), and because in modern times the prosecutors in jury trials in federal criminal cases are "public officials" who must "serve the public interest" (*Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980), citing *Berger* v. *United States*, 295 U.S. 78, 88 (1935)), a district court should endeavor to conform to the custom of public prosecution under the supervision of the Attorney General whenever the constitutional right to a jury trial is implicated.[13]

[13] The district court in this case was sensitive to these concerns, because it directed Bainton to inform the United States Attorney's

2. If the United States Attorney declines prosecution, but the district court nevertheless concludes that the circumstances are sufficiently compelling to justify contempt sanctions, it is our view that the court may exercise the authority conferred by Rule 42(b) to appoint an attorney from outside the Executive Branch to prosecute the charges. We therefore do not endorse petitioners' contention (Pet. Br. 42-44) that the constitutional doctrine of separation of powers absolutely prohibits a court from appointing private counsel to assist it in adjudicating charges of criminal contempt, even where the court has been unable to enlist the aid of the Executive.

The Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) permits Congress to vest the appointment of "inferior Officers" of the United States not only in the President and the Heads of Departments, but also in the "Courts of Law." Accordingly, even assuming that an attorney specially appointed by the court under Fed. R. Crim. P. 42(b) to present and prosecute charges of criminal contempt is an "officer" rather than an "employee" of the government (see *Buckley* v. *Valeo*, 424 U.S. 1, 126 n.162 (1976)), the appointment would satisfy the Appointments Clause. See *Ex parte Siebold*, 100 U.S. 371, 397-398 (1879). Petitioners' reliance on *Buckley* v. *Valeo*, which enforced the principles of separation of powers that are specifically embodied in the Appointments Clause, therefore is without merit as well.

Office of the contempt allegations and the results of his investigation. See pages 4-5, *supra*. By that time, however, Bainton already had been appointed to continue the investigation and prosecute the contempt, and it is understandable that the United States Attorney did not attempt to intervene. In our view, the referral to the United States Attorney ordinarily should occur at an earlier stage, prior to any appointment of private counsel to investigate or prosecute. Moreover, where the district court contemplates that it will institute proceedings under Rule 42(b) if the United States Attorney declines prosecution, the referral should make the court's intentions clear and reflect an actual request by the court itself that the United States Attorney assume responsibility for the matter, not merely a notification of that Office as a matter of courtesy.

Of course, the mere fact that a person is appointed in accordance with constitutional requirements does not insulate his performance from scrutiny under the doctrine of separation of powers. *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 6-11. Moreover, the actual prosecution of federal crimes is uniquely the responsibility of the Executive Branch and cannot be usurped by the Judiciary. *Buckley* v. *Valeo*, 424 U.S. at 138; *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1868); *United States* v. *Cox*, 342 F.2d 167, 193 (5th Cir.), cert. denied, 381 U.S. 935 (1965). For this reason, when a prosecution for contempt is initiated by indictment or information signed by the attorney for the government, that prosecution must remain under the control of the Attorney General.

However, Rule 42(b) contemplates that punishment for criminal contempt may also be imposed in proceedings initiated by the court itself. This power was recognized by Congress in Section 17 of the Judiciary Act of 1789, ch. 20, 1 Stat. 83, and it has been recognized by this Court ever since as an integral attribute of the federal courts that is essential to their ability to enforce their authority. See, *e.g.*, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) at 207; *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Ex parte Terry*, 128 U.S. 289, 302-304 (1888); *In re Debs*, 158 U.S. 564, 594-595 (1895). The existence of this power of self-protection, when exercised in accordance with the limitations prescribed by the Constitution, Congress, and this Court, is not inconsistent with the separation of powers among the Branches, and indeed it promotes a certain balance among those powers. In light of the firmly rooted nature of the courts' power to punish contempts, we do not believe that either the Appointments Clause or the more general doctrine of separation of powers bars a court from appointing an attorney from outside the Executive Branch to assist it in the exercise of that power—at least where the United States Attorney has declined prosecution and

the contempt by a private party does not arise out of litigation to which the United States or an agency or officer thereof is a party.[14]

B. If The United States Attorney Declines To Prosecute, A Private Attorney Appointed To Prosecute Serious Contempt Charges Should Be Disinterested In The Same Manner As The United States Attorney

If the district court chooses to proceed with the adjudication of the contempt charges in a case such as this, despite the United States Attorney's decision not to do so, the attorney appointed by the court to present and prosecute those charges should not be the attorney for a party in the related private civil litigation. In our view, this Court has ample supervisory authority to bar such appointments in the federal courts and to require instead that private attorneys appointed to prosecute serious criminal contempt charges on behalf of the United States under Rule 42(b)[15] must satisfy the same standards as if they had been appointed by the Attorney General to prosecute the charges.

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[14] The departure from the exclusive authority of the Attorney General to prosecute federal crimes in these limited settings is similar to two other situations in which Congress has authorized judicial appointment of officials to bring federal criminal prosecutions in narrowly defined circumstances. For example, under 28 U.S.C. 546 (first enacted in the Act of March 3, 1863, ch. 93, § 2, 12 Stat. 768), when there is a vacancy in the office of United States Attorney, the district court may appoint a United States Attorney to serve until the vacancy is filled. See *United States* v. *Solomon*, 216 F. Supp. 835, 841, 842-843 (S.D.N.Y. 1963). Similarly, under 28 U.S.C. 593, a special court, on the motion of the Attorney General, may appoint an independent counsel to investigate and prosecute crimes involving certain high-ranking government officials.

[15] Criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)). An attorney appointed to prosecute the contempt charges therefore represents the United States, not a private client who has an interest in the matter. The district court in this case expressly appointed Bainton and Devlin "to represent the United States" (C.A. App. 473A).

The appointment in this case did not satisfy those standards. If a Justice Department attorney who represented an interested private party in civil litigation brought a related federal criminal prosecution on behalf of the United States, he would commit a felony under the governing conflict-of-interest statute, 18 U.S.C. 208(a). In addition, the attorney's participation despite the differing interests of his two clients (the private party and the United States) would violate the ABA Code of Professional Responsibility (1979),[16] which is binding upon attorneys employed by the Department of Justice (see 28 C.F.R. 45.735-1(b)) and which has been adopted by the District Court for the Southern District of New York to govern the conduct of attorneys appearing before it.[17] At least in the case of serious charges of criminal contempt, the mere fact that the attorney representing the United States is appointed by the court rather than the Attorney General does not warrant a departure from the generally applicable standards of conduct prescribed by Congress, the Attorney General, the legal profession, and the courts.[18]

1. This Court recently reaffirmed that the courts of appeals have the power "to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice

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[16] See DR 5-105, EC 5-1, EC 5-2, EC 5-14, EC 5-15, EC 5-18. See also ABA Model Rules of Professional Conduct, Rules 1.7, 1.9 (1983); *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-347 & n.11 (1980).

[17] See Rule 4(f) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

[18] By contrast, a Justice Department attorney who participated on behalf of the government in civil litigation brought against a private party would not be barred from participating on behalf of the government in criminal contempt proceedings based on the private party's violation of an injunction entered in the civil litigation. In that situation, 18 U.S.C. 208(a) is inapplicable because the attorney has no private interest resulting from his involvement in the civil litigation, and there is no conflict of interest under departmental regulations and prevailing ethical standards because the attorney is vindicating the interests of the same client in each proceeding.

although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6, quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). See also *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 n.10 (1980). This Court, too, has that power. *Bartone* v. *United States*, 375 U.S. 52, 54 (1963); *McNabb* v. *United States*, 318 U.S. 332, 341 (1943). The supervisory power does not extend to the suppression of evidence for violations of the rights of a "third party not before the court" (*United States* v. *Payner*, 447 U.S. 727, 735 (1980)), or to the regulation of the conduct of members of a coordinate Branch outside of the context of judicial proceedings. *Id.* at 733-735; *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983). But the supervisory power "rests on the firmest ground when used to establish rules of judicial procedure" (*Thomas* v. *Arn*, slip op. 6 n.5, citing Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1465 (1984))—*i.e.*, to establish rules governing "technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process" (Beale, 84 Colum. L. Rev. at 1465). This distinction rests on the separation of powers under the Constitution, for it concentrates the courts' supervisory authority in aid of the exercise of the "judicial power" conferred on them by Article III. *Id.* at 1467-1468, 1508-1513. Compare *Allen* v. *Wright*, 468 U.S. 737, 750-751, 759-761 (1984); *United States* v. *Russell*, 411 U.S. 423, 435 (1973).

Fashioning a general rule barring the appointment of counsel for an interested private party would be consistent with these limitations. The power to punish for contempts "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. (19 Wall.) at 510. That power was recognized by Congress to reside in the federal courts when they were called into existence (*id.* at 510, 512): Section 17

of the Judiciary Act of 1789—the same Section that conferred on the federal courts the power to make "all necessary rules for the orderly conducting [of] business in the said courts" (compare 28 U.S.C. 2071)—provided that the courts "shall have power * * * to punish * * * all contempts of authority in any cause or hearing before the same" (1 Stat. 83). A subject matter so closely associated with the performance of the judicial function is properly subject to judicial control, not only by the trial courts in the first instance, but by the reviewing courts from a more detached perspective. And this Court in fact has regarded the exercise of the contempt power by the lower federal courts as especially suited to regulation and review under its supervisory power. See *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (no sentences in excess of 6 months without right to jury trial); *Yates* v. *United States*, 356 U.S. 363, 366-367 (1958) (revising sentence); *Offutt* v. *United States*, 348 U.S. 11, 13, 17-18 (1954) (reversal of conviction where judge became embroiled in conflict with contemnor); see also Beale, 84 Colum. L. Rev. at 1449 & n.102, 1468-1469.

The adoption of the rule we propose also may be viewed as an aspect of the recognized power of the federal courts to regulate the conduct of attorneys as officers of the court (cf. 28 U.S.C. 1654), to the extent such matters are not separately addressed by federal law (*e.g.*, 18 U.S.C. 208) or within the domain of another Branch (*e.g.*, 28 U.S.C. 547(1)). See, *e.g.*, *Ex parte Robinson*, 86 U.S. (19 Wall.) at 512; *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *United States* v. *Agosto*, 675 F.2d 965, 976-977 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978); Fed. R. Crim. P. 44(c) and advisory committee note, 18 U.S.C. at p. 650. The attorneys here appear not merely on behalf of private clients (compare *Polk County* v. *Dodson*, 454 U.S. 312, 318-319 (1981); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-379 (1866)); they have been appointed to assist the court in the performance of an essential judicial function, which

renders their selection uniquely a matter of judicial concern. Cf. 18 U.S.C. 401(2); *Griffin* v. *Thompson*, 43 U.S. (2 How.) 244, 257 (1844).

2. We also believe that the rule we propose would constitute a sound exercise of the Court's authority. Whatever may be the practice of private prosecutions in some states, the prevailing rule in the federal system is that those who prosecute crimes are "public officials" who "must serve the public interest." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 249; see also *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Accordingly, when the United States Attorney has declined to prosecute what the court regards as a serious charge of criminal contempt, the court's adherence to the principles of disinterested prosecution is warranted by two factors that justified the formal referral to the United States Attorney in the first place: the requirement in 18 U.S.C. 3691 that the trial of contempts to which that statute applies "shall conform as near as may be to the practice in other criminal cases," and the established principle of self-restraint that the court's invocation of its contempt authority must be "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) at 231. In addition, the appointing court cannot ignore Congress's judgment that the avoidance of a financial interest on the part of the Executive Branch counterparts of attorneys appointed under Rule 42(b) is of sufficient importance to warrant felony sanctions. See 18 U.S.C. 208(a). It likewise cannot ignore this Court's concern that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 249-250.

Of course, a proceeding for the adjudication of criminal contempt charges is not in all respects identical to other proceedings in which conflicts of interests could arise. Where such a proceeding is initiated by the court under Rule 42(b), the actual "prosecutorial decision" is

effectively taken away from the attorney appointed by the court to present the case. Several additional factors—the historical role of the civil litigant in bringing allegations of contempt to the attention of the court, his familiarity with the case, and the recognition even today of the legitimate interest the affected private party may have in the outcome (see 18 U.S.C. 402 (fines may be ordered paid to the injured party))—also suggest that the Constitution might tolerate a greater role for the attorney for an interested private party in criminal contempt proceedings than would be permitted in the prosecution of other crimes. Cf. *Polo Fashions*, 760 F.2d at 704, 705 (attorney for interested party may assist United States Attorney or disinterested appointed counsel). Such a role might be considered, for example, where the punishment is not imprisonment (cf. *Scott* v. *Illinois*, 440 U.S. 367 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972)), or where the nature of the contempt does not require a full-blown jury trial, with all the formalities that such a trial implies. The fact remains, however, that contempt is "a crime in the ordinary sense" (*Bloom* v. *Illinois*, 391 U.S. at 201), and the Court accordingly has extended to contempt proceedings most of the constitutional rights typically associated with the prosecution of ordinary crimes. See *id.* at 205-206; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). That characterization of the contempt sanction suggests the appropriateness of a supervisory rule that requires a disinterested prosecutor in cases of serious contempt.

Such a rule, coupled with a requirement that the charges first be referred to the United States Attorney, would constitute an important initial step in addressing the most immediate of the varied and difficult problems associated with the exercise of the contempt power in response to violations of court orders entered in private litigation. At the same time, it would be an appropriately cautious step, leaving to future cases (or to rulemaking by this Court, see *Douglas Oil Co.* v. *Petrol Stops*

Northwest, 441 U.S. 211, 231 (1979)) the development of principles for the adjudication of contempts that result in lesser punishments. A disposition based on the Court's supervisory power also would avoid premature pronouncements regarding the reach of the Due Process Clause in this setting (see *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring)). Basing a ruling in this case on due process grounds could lead to (1) a rigidity in the exercise of a power that historically has been administered in a flexible manner in light of experience and evolving standards of fairness, and (2) a questioning of the constitutionality of statutory provisions still extant in some states that permit the private prosecution of crimes. See generally Note, *supra*, 54 Ford. L. Rev. at 1151-1155.[19]

Nor is there reason to believe that adherence to standards of disinterested prosecution would frustrate the ability of the courts to vindicate their authority with respect to those serious contempts that require a full-blown trial and the presence of an attorney to prosecute the charges before the court. As we have explained, referral of the matter to the United States Attorney for possible prosecution is an important source of protection. But if the United States Attorney declines prosecution and the court nevertheless concludes that the circumstances are sufficiently compelling to warrant punishment, we believe the court will have no difficulty in finding a disinterested member of the bar who can assume responsibility for presenting and prosecuting the charges. We have been informed by the General Counsel of the Administrative Office for the United States Courts that it has

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[19] The Court recently reiterated the view that the "rigid requirements" of impartiality applicable to judicial officers under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), "are not applicable to those acting in a prosecutorial or plaintiff-like capacity," and that "a state legislature 'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people.'" *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 248-249, quoting 273 U.S. at 535.

construed the statutes appropriating funds for the operation of the federal courts to permit the payment of legal fees to attorneys appointed under Rule 42(b).[20]

3. Of course, the supervisory power cannot be exercised in a manner that conflicts with the Constitution or an Act of Congress. *Thomas* v. *Arn*, slip op. 7-8. But there is no such conflict here. The Constitution surely does not *mandate* that counsel for an interested private party be appointed by a court to prosecute serious charges of criminal contempt or prohibit this Court from deeming such an attorney to be disqualified. There likewise is no inconsistency with any statutory provision. Section 17 of the Judiciary Act of 1789 did not "prescribe any special procedure for determining a matter of contempt"; it instead left the mode of proceeding "to be determined according to such established rules and principles of the common law as were applicable to our situation." *In re Savin*, 131 U.S. 267, 275-276 (1889). Although the reach of the contempt power was curtailed by the Act of March 2, 1831 (ch. 99, § 1, 4 Stat. 488), Congress once again did not prescribe detailed procedures. See *Nye* v. *United States*, 313 U.S. 33, 45-48 (1941); *Green* v. *United States*, 356 U.S. at 169-173. See also Act of November 21, 1941, ch. 492, 55 Stat. 779.

The supervisory rule we propose also does not conflict with Fed. R. Crim. P. 42(b). The Second Circuit has relied on Rule 42(b) in support of the practice it sanctioned in this case, on the ground that the advisory committee note cites *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d 1935), cert. denied, 299 U.S. 603 (1936), which contemplated such appointments. See

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[20] We have been further informed by the General Counsel of the Administrative Office that such payments have been approved on two occasions and that the attorneys were paid at the $75 hourly rate at which private attorneys employed by the Department of Justice are compensated. The Second Circuit therefore was mistaken in its belief, expressed in *Musidor* (658 F.2d at 65), that the appointment of counsel for an interested private party is justified on the practical ground that there is no other source of funds to pay attorneys appointed under Rule 42(b).

Musidor, 658 F.2d at 64-65. However, the propriety of the appointment of interested private counsel was not directly presented in *McCann*. That case primarily addressed the problem of ascertaining when a particular contempt arising out of private civil litigation should be regarded as criminal rather than civil. The court recognized that when the United States Attorney initiates the proceedings, the criminal nature of the action will be clear. 80 F.2d at 214. The court also stated that in some instances, the judge may seek the assistance of the attorney for a private party, "who will indeed ordinarily be his only means of information when the contempt is not in his presence" (*ibid.*). But because the character of the proceeding may be more equivocal in such instances, the *McCann* court concluded that the district judge should resolve any doubts on that score by "enter[ing] an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court" (*id.* at 215).

Rule 42(b) was promulgated in 1944, after the decision in *McCann*. The second sentence of the Rule prescribes the form of notice required in a non-summary contempt, which must include a statement of "the essential facts constituting the criminal contempt charged." The third sentence then provides that the notice may be given orally by the judge in open court "or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest."

The advisory committee note states that "to obviate the frequent confusion between criminal and civil contempt proceedings," the "requirement in the *second sentence* that the notice shall describe the criminal contempt as such * * * follows the suggestion made in *McCann*" (emphasis added). See *United States* v. *United Mine Workers*, 330 U.S. 258, 298 n.66 (1947) ("[t]he rule in this respect follows the suggestion made in *McCann*"). However, the advisory committee note says nothing about the source of the reference in the third sentence of Rule 42(b) to appointed counsel, and it does not in any way

endorse the statement in *McCann* that the attorney representing a private party in related civil litigation may be designated to prosecute the contempt. In fact, the third sentence of the Rule does not go so far as to authorize even a disinterested private attorney appointed by the court to play a role in the contempt proceedings beyond filing the application for an order to show cause. Although we do not read that omission to preclude the court from appointing a private attorney to prosecute the charges, we likewise do not read the Rule or the advisory committee's note to foreclose this Court from exercising its supervisory power on this issue.[21]

4. If the Court determines that the appointment of an interested private attorney to prosecute the contempt charges was inappropriate, the question will arise whether petitioners are entitled to any relief. As a general matter, reversal of a conviction does not automatically follow

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[21] Even if the reference to *McCann* had clearly approved the practice referred to in that case, we do not believe it would bar this Court from invoking its supervisory authority in the very different setting presented here. In *McCann* itself, the only sanction, imposed without a jury trial, was a $250 fine—a punishment of a wholly different order than the terms of imprisonment ranging between 6 months and 5 years in this case. Moreover, Justice Goldberg stated in his dissenting opinion in *United States* v. *Barnett*, 376 U.S. 681 (1964), that his research had disclosed only two instances of imprisonment for criminal contempt in excess of six months that had been brought to this Court's attention between the founding of the Republic and 1957 (*id.* at 752 n.35), and in each of those cases, the contempt arose in proceedings brought by the United States. The majority in *Barnett* did not dispute Justice Goldberg's research, and it in fact acknowledged that the severity of punishments for contempt had increased since 1957. 376 U.S. at 694-695. In light of these changed circumstances and the evolution of the law of contempt during the 40 years since Rule 42(b) was promulgated (see *Bloom* v. *Illinois*), the advisory committee note's reference to *McCann* does not foreclose this Court from barring the appointment of counsel for an interested party to prosecute a contempt in circumstances wholly different from those presented in *McCann*. Cf. *Nilva* v. *United States*, 352 U.S. 385, 395-396 (1957); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976).

from the fact that an error occurred in a criminal trial. Depending upon the nature of the right involved, the usual rule is that the defendant must establish that he was prejudiced, unless prejudice is so inherent, or sufficiently likely yet incapable of proof, as to require automatic reversal. See, *e.g.*, *Rose* v. *Clark*, No. 84-1974 (July 2, 1986); *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986); *Strickland* v. *Washington*, 466 U.S. 668, 693-697 (1984).

This case presents the two-fold question whether the error of appointing the attorney for an interested party as the prosecutor is inherently prejudicial or, if not, whether petitioners were sufficiently prejudiced by the error in some way that requires that their convictions be reversed. Those questions present difficult issues that may require close familiarity with the record to resolve. Accordingly, we submit that the Court may wish to leave the matter of remedy to the court of appeals on remand.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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